



## Osgoode Hall Law Journal

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*Volume 11, Number 3 (December 1973)*

Article 2

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### Citation Information

Lederman, Sidney N.. "The Admissibility of Business Records: A Partial Metamorphosis." *Osgoode Hall Law Journal* 11.3 (1973) : 373-396.

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# THE ADMISSIBILITY OF BUSINESS RECORDS:— A PARTIAL METAMORPHOSIS

By SIDNEY N. LEDERMAN\*

Necessity has given rise to a number of exceptions to the Rule against Hearsay.<sup>1</sup> The requirements that testimony be given under the sanction of the oath and subjected to the test of cross-examination have been dispensed with in situations where the declarant of the words in question is unavailable and his oral or written statement was made in circumstances which, it can be presumed, would impress his remarks with a genuinely trustworthy quality. In many situations such declarations are the only cogent evidence available and to exclude them would result in considerable injustice. The Courts accordingly developed exceptions in a haphazard fashion to circumvent the rigidity of the Hearsay Rule in particular instances.<sup>2</sup> Lord Reid in *Myers v. Director of Public Prosecutions*,<sup>3</sup> described the manner in which these exceptions evolved:

By the nineteenth century many exceptions had become well established, but again in most cases we do not know how or when the exception came to be recognised. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. This kind of judicial legislation, however, became less and less acceptable and when over a century ago the patchwork which then existed seems to have become stereotyped.<sup>4</sup>

Although a wholesale rethinking of the Hearsay Rule is necessary and

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<sup>1</sup> The Rule provides that written or oral statements, or communicative conduct made by persons who are not testifying are inadmissible if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein. The Rule has been enunciated in a multitude of cases including the following: *Dalrymple v. Sun Life Assurance Company of Canada*, [1966] 2 O.R. 227 at 231, (aff'd by (1967) 60 D.L.R. (2d) 192); *Blackstone v. Mutual Life Insurance Company of New York*, [1944] O.R. 607 at 618; *Mitchell v. Hanan*, [1943] 3 W.W.R. 431; *Willoughby-Sumner Ltd., v. Sumner*, [1942] 3 D.L.R. 381; *Victoria Mutual Fire Ins., Co. v. Davidson* (1883), 3 O.R. 378; *Ferrie v. Jones* (1851), 8 U.C.Q.B. 192; *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 at 969; *National Fire Insurance Co. v. Rogers*, [1924] 2 D.L.R. 403.

<sup>2</sup> Exceptions to the Hearsay Rule developed in situations where as Master of the Rolls, Sir George Jessel, stated in *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154 at 240, the following four characteristics existed: (1) It was impossible or difficult to secure other evidence; (2) the author of the statement was not an interested party in the sense that the statement was not in his favour; (3) the statement was made before the dispute in question arose; (4) the author of the statement had a peculiar means of knowledge not possessed in other cases.

<sup>3</sup> [1965] A.C. 1001, [1964] 2 A11 E.R. 881.

<sup>4</sup> *Id.*, at 1020 A.C., at 884 A11 E.R.

is taking place in some quarters,<sup>5</sup> today's litigants continue to be plagued, as were their predecessors in the last two centuries, by the vagaries of the Hearsay Rule and its multiple exceptions. This note will focus upon the traditional exception most commonly invoked by the parties — declarations made in the course of a business duty — and will consider the impact of recent judicial and statutory reform.

### A. *The Classical Exception*<sup>6</sup>

The importance of this exception has, for the most part, been superseded by a Federal enactment and legislation in a number of Provinces which allow for the admissibility of written business documents if certain criteria are met. Medical reports are also admissible by statute in Ontario, Saskatchewan and Quebec.<sup>7</sup> Although these provisions have taken away much of the force from this common law exception, it still remains of considerable value in situations where counsel is faced with the problem of adducing evidence of an oral statement or where counsel wishes to put in a written business record which fails to meet the requirements of the relevant statutory provisions. An examination of the common law rule is therefore in order.

An exception was justified for this class of hearsay statement on the basis of necessity, the declarant no longer being available to give evidence.<sup>8</sup> Moreover, the statement was said to possess a circumstantial guarantee of truth arising from the fear of the declarant of censure and dismissal should an employer discover an inaccuracy in the statement and from the fact that constant routine and habit in making entries provide some likelihood of accuracy.<sup>9</sup>

The traditional rule can be enunciated as follows:

Statements made by a deceased declarant under a duty to another person to do an act and record it in the ordinary practice of the declarant's business or calling are admissible in evidence provided they were made contemporaneously with the fact stated and without motive or interest to misrepresent the facts.<sup>10</sup>

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<sup>5</sup> See Murray, *The Hearsay Maze: A Glimpse at Some Possible Exits* (1972), 50 Can. B. Rev. 1.

<sup>6</sup> The structure of this note follows Professor Stanley Schiff's conceptual organization of business record materials under three headings: A. The Traditional Common Law Rule; B. Modern Common Law Rules; C. Statutory Rules: See Schiff, *Evidence in the Litigation Process: A Coursebook in Law*. (Draft edition, 1972).

<sup>7</sup> These statutory provisions are discussed *infra* at p.23 *et seq.*

<sup>8</sup> *Lefebure v. Worden* (1750), 2 Ves. Sen. 54.

<sup>9</sup> *Poole v. Dicas* (1835), 1 Bing. N.C. 649 at 652.

<sup>10</sup> Similar statements appear in *Palter Cap Co., Ltd. v. Great West Life Assurance Co.*, [1936] O.R. 341 at 357-58, [1936] 2 D.L.R. 304 at 310; in Cross, *Evidence* (3rd ed. London: Butterworths, 1967) at 406; in R. Baker, *The Hearsay Rule* (London: Pitman, 1950) at 78; in J. Tregarthen, *The Law of Hearsay Evidence* (London: Stephen and Sons Limited, 1915) at 113.

(i) *The Declarant Must Be Dead*

It would be reasonable to believe that in cases where the declarant is not dead but his unavailability is explained to the satisfaction of the Court, his evidence would be admitted provided that all the other essential elements exist. Reason and logic, however, have never permeated this area of the law. As a condition precedent to the admissibility of the hearsay statement the declarant must be shown to be dead at the date of trial and no other ground for his absence is acceptable.<sup>11</sup> No clear explanation has been given for this narrow restriction except that the death of the declarant and the absence of other evidence makes the admissibility of the statement necessary. It surely can be said, for the same reason, that other forms of unavailability should be considered. For example, is the situation any different if the declarant, although not deceased, is afflicted with an insane disease rendering him incompetent to testify? Similarly, should the evidence be held inadmissible because the declarant is out of the jurisdiction or cannot be found after a reasonable and diligent search had been made? The stamp of trustworthiness impressed upon the declaration would be no less diminished if it could be shown to the Court that for reasons other than the demise of the declarant, he is unavailable to testify, and it is impossible or unreasonable to expect the party to secure his attendance.<sup>12</sup> Although criticism against such a narrow requirement can readily be levied, it is so well entrenched that little can be gained by reiterating its unreasonableness.

(ii) *The Duty Must be One to do a Specific Act and Then Record it when Done*

Only those statements which record facts that the declarant is duty-bound to perform and record in the course of his profession or trade are admissible. In *Palter Cap Co., Ltd., v. Great West Life Assurance Co.*<sup>13</sup> the issue was whether the deceased had deliberately made untrue statements on an application for an insurance policy by stating that he was in good health and suffered from no heart ailment. The defendant contended that prior to making the application the deceased had consulted a heart specialist with respect to a cardiac problem. In proof thereof, the insurance company tendered records taken from the files of the heart physician, Dr. Murray, who had died some time thereafter. The records included *inter alia*:

- (a) A written medical history of the deceased patient;
- (b) A cardiograph and screen tracing bearing the deceased's name and a date prior in time to that of the insurance application;

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<sup>11</sup> In *National Fire Insurance Company v. Rogers*, [1924] 2 W.W.R. 186, [1924] 2 D.L.R. 403 and in *Cooper v. Marsden* (1793), 1 Esp. 1. statements were excluded because there was no evidence that the declarants were deceased, although they were clearly unavailable for attendance at trial. Also see *Myers v. Director of Public Prosecutions*, *supra*, note 3 at 1027-28 A.C., at 889 A11 E.R.

<sup>12</sup> American courts have held that insanity or sickness or the absence of the declarant from the jurisdiction is sufficient to justify admissibility of the statements: 5 Wigmore, *Evidence*, ss.1402-1408. Also see Rule 509 of the Model Code of Evidence.

<sup>13</sup> *Supra*, note 10. See C.A. Wright, Case Note (1936), 14 Can. B. Rev. 688.

- (c) A letter by the specialist to the instructing physician again bearing a date prior to the date of the application and reporting on the examination of the deceased.

The court was satisfied that these records related to an examination performed by the doctor in the ordinary course of his business and duty and that the statements were made at or near the time at which the medical examinations were conducted. Although the nature of the act clearly came within a physician's business and duty, the court questioned whether the making of the records and the drafting of the reporting letter were in the ordinary course of the doctor's business and in pursuance of a duty. Upon hearing evidence on the obligation or duty of a specialist to furnish a report to the physician who referred the patient to him, the court conceded that the specialist was duty bound not only to exercise skill in making the examination, but he was also under a duty in the ordinary course of practice in the medical profession, to report the results to the family physician, so that he might have the benefit of the specialist's diagnosis and opinion in the subsequent treatment of the patient.<sup>14</sup> In addition to the reporting letter, Masten J.A., held that the written medical history, the cardiograph and screen tracing were admissible upon the following basis:

In the present case it was essential that Dr. Murray should make the investigations and tests recorded in exhibits (b) and (c) [cardiograph and screen tracing]. He could not make his report unless he did so, and the very act of making these investigations and tests involved the creation of the records (b) and (c). Using the words of Vaughan Williams L.J., the making of these examinations and tests "was therefore a step in obtaining the ultimate result."

For these reasons I am of opinion that exhibits (b) and (c) and (d) [the cardiograph, screen tracing and reporting letter] are admissible in evidence. If I thought that in so deciding I was extending in the smallest degree the ambit of this exception to the general rule barring hearsay evidence, I would have the greatest hesitation in so holding, for I fully appreciate the danger of widening the exception in question.<sup>15</sup>

The Alberta Court of Appeal in *McGillivray v. Shaw*<sup>16</sup> held admissible a memorandum prepared by M's solicitor, since deceased, as a declaration made in the course of duty to show that the arrangement between M and N which was in issue in the action was such that M was in possession of land owned by N, not merely as a tenant of the latter but under an agreement of sale. The Court held that as M's solicitor, there would be a duty to record the particulars of the agreement to be used by him at a later time either in drawing or checking the necessary documents.

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<sup>14</sup> In *Mills v. Mills* (1920), 36 T.L.R. 772, *Simon v. Simon et al*, [1936] P.17, and in *Dawson v. Dawson and Heppenstal* (1905), 22 T.L.R., medical reports and histories made by deceased physicians were excluded because no duty to another in preparing such documents could be established.

<sup>15</sup> *Supra*, note 10 at 362 O.R. at 314 D.L.R. In *Mellor v. Walmsley*, [1905] 2 Ch. 164, Romer L.J. in holding admissible an engineer's field book which contained survey figures and measurements said at 167: "It was his duty to make measurements. He could not make a plan without taking measurements and he could not discharge his duty without making these entries."

<sup>16</sup> (1963), 39 D.L.R. (2d) 660.

In *Conley v. Conley et al.*,<sup>17</sup> the Ontario Court of Appeal had before it the question whether notes, made by a private investigator since deceased, of observations he had made of the respondent and co-respondent, were made in the ordinary course of business in pursuance of a duty. The evidence revealed that as an employee, the private detective was responsible for making notes during the course of his investigations and presenting them to his superior. McKay J.A., in ruling the notes admissible had this to say:

... I am of the view that under the ordinary rules of evidence they are admissible under the exception to the hearsay rule that entries made in the ordinary course of business by a person who is later deceased are admissible, provided the conditions of admissibility are met. Those conditions are set out most conveniently in *Wigmore on Evidence*, 3rd ed., vol. V, pp. 372-3, s. 1524, and it is stated in this way:

Its requirements are strict. First, there must have been a *duty to do the very thing* recorded. Secondly, there must have been a *duty to record or otherwise report the very thing*. Thirdly, the duty must have been to record or otherwise report it *at the time*.

As to whether it is in the regular course of business, Wigmore at pp. 370-1, s. 1522 of the same volume, makes this statement:

The entry must have been, therefore, in the way of *business*. This may be defined to mean a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood. It would probably exclude, for instance, a diary of doings kept merely for one's personal satisfaction; but it would not exclude any regular record that was helpful, though not essential nor usual in the same occupation as followed by others. There is, therefore, no special limitation as to the *nature of the occupation*.<sup>18</sup>

The Courts, therefore, will look carefully at the act performed and the recording thereof to ensure that both fall within the purview of the declarant's business duty. One, however, must question the rigid prerequisites to the admissibility of statements under this exception. A better approach would be to examine the statements and consider the dangers that would result should they be admitted without their being given under oath and in the absence of cross examination. In the *Palter* case, there is little hazard accompanying the admissibility of the doctor's report and the medical results upon which it was based. They were, for the most part, comprised of objective data and accordingly there was little risk of distortion in the doctor's perception or memory. Moreover, there was no apparent reason for the specialist to be insincere particularly when he had nothing to gain and inaccuracy could be detected subsequently by other physicians. Having regard, therefore, to these minimal dangers, these documents could rationally be admitted without the court going through an analysis to ascertain whether the doctor had a duty to both do the act and record it and then report to the instructing physician. On the other hand, should the courts be so eager to admit the notes of a deceased private detective, as in *Conley*, even though they may

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<sup>17</sup> [1968] 2 O.R. 677, 70 D.L.R. (2d) 352.

<sup>18</sup> *Id.*, at 678 O.R., at 353 D.L.R.

meet the necessary conditions of the common law exception? Upon a consideration of the hearsay dangers, one has no guarantee that the investigator was in a position to observe what he recorded or that he actually perceived what he thought he observed. Furthermore, is there sufficient assurance of the deceased's sincerity? He was engaged by the petitioner specifically for the purpose of detecting illicit acts between the respondents with a view to using this evidence in order to secure a divorce. It was, therefore, to the advantage of the detective to come forth with a report that would confirm the reason for his being hired. In light of all these dangers, one should be concerned with the willingness of Courts to allow in such evidence, untested by cross examination, merely because it complies with the requirements of the exception. The Courts have been reluctant, however, to follow a pragmatic line of reasoning in considering the admissibility of such statements.

The duty in making a record must be one owed to some person other than to the declarant himself.<sup>19</sup> It must be more than just the personal custom of the declarant. Thus in *Massey v. Allen*,<sup>20</sup> an entry made in the day book of a deceased stockbroker was held inadmissible because the stockbroker had no duty as between himself and his client to keep such a record. It has also been held that entries in books kept by a deceased solicitor are inadmissible under this common law exception if he was under no duty to maintain proper books<sup>21</sup> although the entries could be admissible as declarations against interest. In *O'Connor et al v. Dunn*,<sup>22</sup> notes kept by a deceased surveyor in a book in which he recorded both private and professional matters which was tendered in proof of the existence of a boundary between two lots was excluded on the ground that the surveyor owed no duty to anyone to keep such notes. In 1827, there was no statutory provision requiring the surveyor to keep records of his survey work. Nor was there any fixed practice or custom among surveyors at that time to keep such notes. Burton J. A., expressed the following view of the surveyor's notes:

... it appears clear upon the cases that the declaration to be evidence must be confined strictly to the particular thing which it was the duty of the person to do, and that it must appear not only that it was his duty to do the act, but to make an entry of it.

... It is, to my mind, a misnomer to call the document offered in evidence "Field notes." It was a simple entry in Mr. Gibson's diary, made for his own satisfaction or convenience, and it does not comply with any of the conditions under which the relaxation of the rule against the admission of hearsay evidence has been admitted. It is not shewn *aliunde* that the survey was made, and there was no obligation cast upon Mr. Gibson to make any entry or record upon the subject;

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<sup>19</sup> *McDonald v. Young* (1933-4), 7 M.P.R. 602 at 612, [1934] 4 D.L.R. 172 at 179.

<sup>20</sup> (1879), 13 Ch. D. 558, 49 L.J. Ch. 76.

<sup>21</sup> *Bright v. Legerton* (1861), 2 De G.F. & J. 606 at 617; *Hope v. Hope* [1893] W.N. 21; *Ecroyd v. Coulthard*, [1897] W.N. 25; but see *contra*, *Rawlins v. Rickards* (1860), 28 Beav. 370.

<sup>22</sup> (1877), 2 O.A.R. 247.

and if there were, one would scarcely look for it in a memorandum book in which he entered the ordinary passing events of the day.<sup>23</sup>

The duty, moreover, must be specific in nature. In *Smith et al v. Blakey*,<sup>24</sup> an agent of the plaintiff firm of merchants had agreed, on behalf of the plaintiff, to purchase an order of shoes from a manufacturer. He wrote the plaintiff a letter advising of the purchase and that he had received "three huge cases" of shoes from the defendant manufacturer. The agent had died prior to trial and an attempt was made to introduce the letter as a declaration made in the course of duty. Although the deceased clerk was under a general duty to communicate to his principals all business that was transacted at the branch office, he was under no *particular* duty to report the receipt of three cases of shoes and the details surrounding that transaction. Accordingly, the letter was held inadmissible. The exception is therefore restricted to those situations in which it was the duty of the declarant to do a specific thing and to record its performance. In *Dominion Telegraph Securities Ltd. v Minister of National Revenue*,<sup>25</sup> in proof of a settlement, the appellant tendered evidence of oral statements of negotiations for settlement made by its deceased secretary-treasurer and general manager to the appellant's solicitor who was consulted after the alleged settlement for the purpose of making a distribution of the proceeds of that settlement among the appellant's shareholders. The Supreme Court of Canada rejected this evidence because the officer's duty to make the statements to the company's solicitor was not clearly established.<sup>26</sup> The settlement having been completed, any statements made by the deceased corporate officer as to the negotiations and reason for settlement would not be part of the instructions given to the solicitor with respect to the disposition of the proceeds. Similarly in *Chambers v Bernasconi*<sup>27</sup> a report made by a deceased sheriff's officer which included among other things the location of an arrest was excluded on the ground that, although the declarant owed a duty to report the arrest, he was under no specific duty to the sheriff to record the place where he had arrested the accused.

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<sup>23</sup> *Id.*, at 258, 259. Also see *McGregor v. Keiller* (1883), 9 O.R. 677. Subsequently the Surveys Act, R.S.O. 1897 c.181, s.40, was enacted to provide that surveyors were to keep regular field notes and to provide copies to the relevant parties. In *Lakefield v. Brown* (1910), 15 O.W.R. 656, 1 O.W.R. 589, Clute, J. held a surveyor's field notes admissible stating at 660, O.W.R., at 590 O.W.N.: "... it was clearly the duty of the surveyor to make the survey which he did from which to prepare the plan. It was the original plan of the particular lot. The plan was in fact filed. A portion of the village was laid out in pursuance of that plan. The field notes form an essential part of the work which was necessary to be done to make the plan available. As to what was in fact done could not be fully known except from the field notes. I am strongly inclined to the view that in this case the notes were admissible."

<sup>24</sup> (1867), L.R. 2 Q.B. 326, 36 L.J.Q.B. 156.

<sup>25</sup> [1947] S.C.R. 45, [1946] 4 D.L.R. 449.

<sup>26</sup> In *Mercer v. Denne*, [1905] 2 Ch. 538, a survey of a castle prepared in the year 1816 was tendered by the defendant in disproof of a claim of custom by fishermen to spread their nets to dry on his shore to show that the sea had, within living memory, covered the land in question. The survey was excluded because it could not be clearly established whether the surveyor was or was not under a duty to prepare the document.

<sup>27</sup> (1834), 1 Cr. M. & R. 347.



(iii) *The Act Must Have been Completed*

The statement must relate to acts which have been performed. It will be excluded if it refers to an act to be done at some future time even though it is to be performed in pursuance of a duty. A statement of intention to perform an act offers no guarantee that the act was in fact subsequently performed. Thus in *Rowlands v. De Vecchi*,<sup>28</sup> a record kept by a deceased clerk in postage books setting out letters to be posted was excluded when tendered to prove that a certain letter had been mailed.<sup>29</sup>

(iv) *The Act Must Have Been Performed By The Declarant Himself*

James L. J., in *Polini v. Gray*<sup>30</sup> indicated that not only was it a pre-requisite that the declarant possess personal knowledge of the act, but that he must have performed it or taken an active part in it:

... The principle has never been questioned in any case, and it is this, that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained, by the person making the entry, but an entry of a business transaction done by him or to him, and of which he makes a contemporaneous entry. For nothing else was it admissible, and it was received only because it was the person's duty to make that entry at the time when the transaction took place. The exception is entirely confined to that:<sup>31</sup>

In *Brain v. Preece*<sup>32</sup> it was held that the deceased declarant's recording of the weights of coal given to him by an employee was insufficient to render his records admissible. They could be admitted only if the declarant had weighed the coal himself.<sup>33</sup>

(v) *The Statement Must Have Been Made Contemporaneously with The Act*

This is a condition which has been laid down by a number of cases.<sup>34</sup> Although absolute contemporaneity is not required, the declaration must be

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<sup>28</sup> (1882), 1 Cab. & E. 10

<sup>29</sup> But see *contra*, *R. v. Buckley* (1873), 13 Cox C.C. 293 in which a report, made by a police officer to his superior that he was proceeding to a particular location to observe the accused, was admitted as evidence that the murdered police officer and the accused had met each other at that place. This case, however, was not considered by the Court in the *Rowlands* case and appears to be of doubtful authority.

<sup>30</sup> (1879), 12 Ch. D. 411.

<sup>31</sup> *Id.*, at 426. Quoted with approval by Bowen L.J. in *Lyell v. Kennedy* (1886), 56 L.T. 647 at 657 and by Estey J., in *Dominion Telegraph Securities Ltd., v. Minister of National Revenue*, *supra*, note 25 at 62 S.C.R. at 463 D.L.R.

<sup>32</sup> (1843), 11 M. & W. 773.

<sup>33</sup> In *The Henry Coxon* (1878), 3 P.D. 156 at 148, Sir Robert Phillimore in rejecting log entries by a deceased sailor relating to a collision at sea said, "Entries in a document made by a deceased person can only be admitted where it is clearly shown that entries relate to an act or acts done by the deceased person and not by third parties." The sailor's entries included the movements of the other ship as well as his own and were therefore inadmissible.

<sup>34</sup> *Doe v. Turford* (1832), 3 B. & Ad. 890 at 898; *Barton v. Dundas and Parsons* (1865), 24 U.C.Q.B. 273; *O'Connor et al v. Dunn*, *supra*, note 22 at 259, 261 et seq., *Polini v. Gray*, *supra*, note 30 at 425, 430; *Mercer v. Denne*, *supra*, note 26 at 558; *Re Djambie Rubber Estates Ltd.* (1912), 107 L.T. 631; *Hart v. Toronto General Trusts* (1920), 47 O.L.R. 387.

"made at or about the time of the transaction."<sup>35</sup> Each case turns on its own circumstances; in *Price v. Torrington*,<sup>36</sup> the act of delivering beer was performed in the morning and a record thereof made in the evening and it was held that there was sufficient contemporaneity; in *The Henry Coxon*<sup>37</sup> and in *Re Djambie Rubber Estates Ltd.*,<sup>38</sup> however, a hiatus of two days and one month, respectively, in recording the fact rendered the statements inadmissible; in *McGillivray v. Shaw*,<sup>39</sup> the memorandum prepared by the solicitor was admissible even though it was not contemporary with the original agreement of purchase and sale but made "immediately after" the agreement was confirmed. Vaughan Williams L. J., in *Mercer v. Denne*<sup>40</sup> stipulated that the entry must be proved to be the last step in a continuous chain of duty. Thus, the Courts have not been prepared to allow a wide latitude in time between the doing of the act and making a report of it. The test is quite strict as any guarantee of accuracy necessarily dissipates with the passage of time. Accordingly, the declaration must be made within such time after the act as to be part of it.

Contemporaneity is not a precondition to the admissibility of declarations against interest though its absence may affect the weight to be attributed to them. No apparent reason can be traced for its requirement as a condition precedent to admissibility of declarations in the course of duty, but not declarations against interest. There appears to be no sound reason for maintaining the distinction and may best be resolved by making it a factor going to weight alone.

(vi) *The Declarant Must Not Have any Motive or Interest to Misrepresent*

It has been held that the declarant must have been disinterested in the statement and had no motive to misstate the act or transaction that took place.<sup>41</sup> Johnson J.A. in *McGillivray v. Shaw*,<sup>42</sup> found as one of the bases for admitting the deceased solicitor's memorandum that as it was made for his own use at a later date to draft the formal documents, he had no interest in misstating the facts which he was setting out. In *Conley v. Conley*,<sup>43</sup> however, as has been pointed out,<sup>44</sup> the notes of a private investigator were admitted, notwithstanding he was engaged by one party to the litigation to gather evidence against the other. In those circumstances, it is difficult to believe that the declarant was entirely without motive or interest to misrepresent the facts in his notes or report.

<sup>35</sup> Per Burton, J.A. in *O'Connor et al v. Dunn*, *supra*, note 22, at 259.

own circumstances; in *Price v. Torrington*,<sup>36</sup> the act of delivering beer was

<sup>36</sup> (1703), 1 Salk. 285.

<sup>37</sup> *Supra*, note 33.

<sup>38</sup> *Supra*, note 34.

<sup>39</sup> *Supra*, note 16.

<sup>40</sup> *Supra*, note 26 at 558.

<sup>41</sup> *Polini v. Gray*, *supra*, note 30 at 430; *The Henry Coxon*, *supra*, note 33; *Hart v. Toronto General Trusts*, *supra*, note 34.

<sup>42</sup> *Supra*, note 16.

<sup>43</sup> *Supra*, note 17.

<sup>44</sup> See text, *infra* at p.9.

Lack of motive is not a matter going to the admissibility of declarations against interest. Again, there is no logical foundation for its preservation as a condition precedent to the admissibility of only declarations in the course of duty. The arbitrary distinction should be removed and if the declarant is shown to possess a motive to fabricate or distort, it should go to the weight of the statement.

(vii) *Collateral Matters are Inadmissible*

Another point of difference between this exception and declarations against interest is that unlike the latter,<sup>45</sup> collateral facts in a statement are not admissible. Only that part of the statement which is in fact made in the course of duty is admissible. Extraneous matters accompanying that declaration are excluded.<sup>46</sup> In issue in *Johnston v. Hazen*<sup>47</sup> was the marital status of the father of the claimant at the time of his first marriage. In proof thereof, entries in the register kept by the rector of St. Paul's were tendered. Barker J., rejected the entries as being collateral and not coming within the rector's duty to record. He stated:

...if it was the duty of the rector of St. Paul's, in marrying these persons, to make a record of it in accordance with the extract from *Bacon* which I have just cited, and if in discharge of that duty he did make the entry, the register is evidence of the fact which it was his duty to record in it. That fact is, the marriage of the parties; not whether the man was a bachelor or a widower. That is a collateral statement, unimportant so far as the act of marriage which the rector was to perform under the license is concerned, and of which he was to make an entry in the register.<sup>48</sup>

There is no reason for maintaining the rule that facts collateral to a statement made in the course of duty should be excluded. The guarantee of trustworthiness which justifies the reception of declarations made in the course of duty equally applies to collateral statements which naturally accompany the narrative.

B. *Emergence of a New Judicial Rule*

A strict adherence to the traditional common law exception often leads to anachronistic results as in the case of *Myers v. Director of Public Prosecutions*.<sup>49</sup> In that case, the accused were charged with conspiracy to receive stolen cars and to defraud the purchasers of the stolen cars. In order to prove its case, the Crown wished to show that the numbers on the cylinder blocks of the cars corresponded with the numbers contained in the car manu-

<sup>45</sup> *Higham v. Ridgway* (1808), 10 East. 108; *Homes v. Newman*, [1931] 2 Ch. 112 at 121; *McDonald v. Young*, *supra*, note 19 at 613-14, M.P.R. at 180 D.L.R. *Polak v. Polak* (1963), 41 W.W.R. 160 at 172, 38 D.L.R. (2d) 333 at 344.

<sup>46</sup> *Chambers v. Bernasconi*, *supra*, note 27, *Polini v. Gray*, *supra*, note 30.

<sup>47</sup> (1905), 3 N.B. Eq. 147.

<sup>48</sup> *Id.*, at 162.

<sup>49</sup> [1965] A.C. 1001, [1964] 3 W.L.R. 145, [1964] 2 A11. E.R. 881. In Canada, the Saskatchewan Court of Appeal rejected the evidence of the business records of an automobile manufacturer made by unascertained persons in *National Fire Insurance Co. v. Rogers*, [1924] 2 D.L.R. 403.

facturer's records which were entered by employees as the cars left the assembly line. The House of Lords held that such records were inadmissible as hearsay and failed to come within any of the recognized exceptions. The court indicated that the tenet of the Hearsay Rule has been firmly established for the better part of two centuries and although fresh exceptions were judicially created in the nineteenth century, the creation of any new exceptions in the twentieth century were to be left to the legislators and not to the courts. If, however, it could have been proven that the original makers of the record were dead, their record would have been admissible under the traditional common law rule as a declaration made in the course of a business duty.

How important a fact, in the context of the *Myers* case, was the failure to show that the declarant was dead at the time of trial? In deciding that the evidence of the records was inadmissible, the House of Lords did not consider which of the hearsay dangers, if any, were present. No analysis was made as to how the evidence might be received and yet afford some measure of protection to the accused.

If the court had allowed the business records to go in, what hearsay dangers would have resulted? Was there any danger of fabrication on the part of the workmen who entered the numbers in the records? Surely there was no deliberate insincerity on their part as they had no interest in making false entries. They made these records when the cars were first manufactured, and accordingly, there was no real risk of fabrication. Thus, cross examination of the workmen would not in all likelihood have disclosed any insincerity.

Could there have been faulty perception on the part of the workmen? It is possible, perhaps, that an employee could have mistaken a "3" for an "8"; however, cross examination could never have disclosed this deficiency.

Furthermore, the House of Lords ignored the fact that these business records formed the best evidence available. Had the original workmen been found, their evidence would have been no better than the record itself. Their testimony would have been dependent entirely upon the business record itself, one of hundreds they would have made, and their personal appearance in court as witnesses would have no effect whatsoever on the validity of that record. Thus, having the workmen present for cross examination would have added nothing to the proceeding. So, in the *Myers* case, there existed a situation where the hearsay evidence posed few, if any of the customary dangers, and the protection for the accused and the guarantee of trustworthiness of the evidence would not have been improved if the original declarants were called to testify. Nothing was to be gained by barring the hearsay evidence.

Moreover, the House of Lords ignored the question of necessity. How could the Crown ever locate the workmen who made the original records? In the modern-day world of giant corporations, there is the problem of anonymously prepared records. Considerations of necessity and convenience dictate the admissibility of such business records.

Aware of these criticisms, the Supreme Court of Canada in *Ares v.*

*Venner*,<sup>50</sup> in the absence of any statutory provision, chose not to follow the decision in the *Myers* case and indicated an acceptance of the reasoning of the minority in that case, when it allowed in nurses' notes in a malpractice suit against a physician without the necessity of the original makers of the notes being called as witnesses.

This judicial reform of the common law exception makes sense for a number of reasons. First, there is the consideration of mercantile convenience. To call all the persons responsible for keeping a record in a large institution is too inconvenient and may in fact serve to disrupt the business of that institution by taking a multitude of witnesses away from their work. Secondly, one must consider the expense to the litigants in seeking out and subpoenaing all relevant witnesses. Thirdly, the cost to the public should be considered and the great length of time that will be consumed at trial by the testimony of all the witnesses called merely to prove a business record. Fourthly, with records of a hospital, involving the health of patients, it can be taken for granted that nurses, guided by the highest motives, will make every effort to keep accurate notes.<sup>51</sup> The nurses have no interest, apart from their duty, in keeping the notes and therefore, in all likelihood, it is an impartial and trustworthy record of the patient's condition. Furthermore, no advantage results by calling the nurses themselves. In all probability they will have no independent memory apart from the notes that they made, and therefore, the notes as evidence are superior to the testimony of the nurses. All of these factors give rise to a circumstantial guarantee of trustworthiness which justifies the reception of the document without the necessity of calling the declarants.

The innovative decision of the Supreme Court of Canada in *Ares v. Venner* is admirable in opening the road of admissibility to allow in business records which do not fall under the umbrella of the traditional common law exception. In so doing, however, one must ask whether the Court has gone one step too far. It claims to have adopted the minority opinion in the *Myers* case. There is, however, a major distinction between the two cases. The records kept in the *Myers* case (and in *Omand v. Alberta Milling Co.*<sup>52</sup> and *Ashdown Hardware Co., v. Singer et al.*<sup>53</sup> and *Canada Atlantic Railway Co., v. Moxley*,<sup>54</sup> which were referred to by the Supreme Court of Canada) all dealt with situations where the declarant merely recorded data that was presented to him. It amounted to no more than a transcription of numbers and other mathematical or monetary data. In making such a record, the declarant did not have to interpret what he observed. His opinion or interpretation was not material as he merely had to copy the results of a test or other scientific or technical material. In *Ares v. Venner*, however, the nurses were not just recording the objective data of blood pressure or pulse rate; they were observing the condition of the patient and interpreting his condition in a subjective way. The notes stated at times that the patient was "blue", or

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<sup>50</sup> [1970] S.C.R. 608, 14 D.L.R. (3d) 4.

<sup>51</sup> See *Horn v. Sturm* (1965), 408 P. 2d. 541 at 549.

<sup>52</sup> [1922] 3 W.W.R. 412, 18 Alta. L.R. 383.

<sup>53</sup> (1951), 33 W.W.R. (N.S.) 145.

<sup>54</sup> (1889), 15 S.C.R. 145.

"blueish pink", or "cool", or "cold". Unlike the *Myers* case, these records give rise to the spectre of hearsay dangers. The nurses' perception, observation and interpretation may have been subject to error. The opponent has lost his opportunity to cross examine on the nurses' ability to perceive and to interpret accurately what they saw. It is suggested that the records which are based on such subjective factors do not stand on the same footing as the manufacturer's records of numbers in the *Myers* case. It is one thing to allow in objective business records where it is too inconvenient to call the declarant. It is another matter entirely to extend this to business records which turn greatly on the declarant's ability to perceive. Mr. Justice Hall thought that it was a sufficient safeguard to the opponent who wishes to challenge the accuracy of the nurses' notes, that he can call the nurses to the stand himself. The nurses were present in the courtroom during the trial and thus were available to be called as witnesses by the opponent. But, does this afford a sufficient protection against the hearsay dangers? If the opponent calls them to testify, how can he cross examine them? They are his witnesses and thus he can only examine them in chief unless they show hostility in their demeanour on the stand by being evasive or generally unresponsive to the questions put to them. That does not allow counsel to properly test the nurses' perception.

What if the nurses were not available in the courtroom for examination? Would the Supreme Court of Canada still have adopted the minority decision in the *Myers* case and applied it to the nurses' records which were dependent upon subjective criteria? Are the hearsay dangers eliminated only because the declarants were in the courtroom and could be examined by opposing counsel?

In *C.P.R. v. City of Calgary*,<sup>55</sup> the appellate division of the Alberta Supreme Court applied *Ares v. Venner* to admit business records where the makers thereof were not readily available. In an action by the railway against the City for damages resulting from a train derailment caused by the collapse of a culvert constructed under the track by the City, the court admitted a summary of facts and figures extracted from the business records of the railway which it tendered on the question of damages to show which cars were destroyed. Unlike the *Ares v. Venner* case, the data recorded in the document was purely objective. It still remains an open question as to whether the decision in *Ares v. Venner* will be applied to situations where the declarant is not only not available, but his record is substantially subjective in nature.

In any event, the Supreme Court of Canada has trodden where no English court has. It ignored the admonition of the majority opinion in the *Myers* case that it is for the legislature, not the courts to extend the common law exceptions to the Hearsay Rule to admit business documents. The minority in the *Myers* case would have allowed in business records because of the anonymity of the makers of the records and the impossibility of tracing them. The Supreme Court of Canada in *Ares v. Venner* did not even think that un-

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<sup>55</sup> [1971] 4 W.W.R. 241.

availability of the declarant was a necessary precondition to the admissibility as the nurses were not only identifiable but were available in the courtroom.

The decision in *Ares v. Venner*, though important to those Provinces which have no statutory provision with respect to the admissibility of business records, has had little practical impact in those Provinces which have enacted legislation to circumvent the narrow scope given by the traditional common law exception. One qualification, however, is necessary here. As will be seen, the provincial legislation does allow in hospital records. But quare whether this provision sanctions the admissibility of hospital records which contain not only the objective data of temperature, pulse rate, etc., but the impressions and diagnostic opinions of doctors and nurses? If they do not, then in this context, *Ares v. Venner* may still be of relevant and practical importance in those Provinces which do have business record statutes.

### C. *Admissibility By Statute*

In order to obviate the difficulties of adducing evidence of business records under the narrow, traditional common law exception, the legislatures enacted, in a piecemeal fashion, provisions which facilitated the admission of particular documents and records without the attendant disruption of, or interference with the commercial, business or governmental world. Thus, banking records, letters patent, foreign judgments of certain jurisdictions, copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed under the authority of the United Kingdom Parliament, or of the English government, or by or under the authority of the government of any legislative body of any state within the Dominions,<sup>56</sup> were made admissible without any necessity of calling the makers of the documents.

The culmination of this legislative reform has been the business record provisions modelled on comparable American enactments.<sup>57</sup> Under these statutes, business records of a great variety are now admissible;<sup>58</sup> but, a close examination of the various provisions reveals serious limitations to the scope

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<sup>56</sup> See *Canada Evidence Act*, R.S.C. 1970, c.E-10, sections 19-24, 26-29, 32 and *The Ontario Evidence Act*, R.S.O. 1970, c.151, sections 25-30, 32, 34, 39-42.

<sup>57</sup> The *Canada Evidence Act*, R.S.C. c.E-10, s.30, and the Evidence Acts of British Columbia, R.S.B.C., 1960, c.134 as amended by S.B.C., 1968, c.16, s.43a, New Brunswick R.S.N.B., 1952, c.74 as amended by S.N.B. 1960, c.29, s.42A, Nova Scotia R.S.N.S., 1967, c.94, s.22, Ontario, R.S.O. 1970, c.151, s.36, and Saskatchewan, R.S.S. 1965, c.80, as amended by S.S. 1969, c.51, s.30a.

<sup>58</sup> "... This section would cover such diverse things as, perhaps, pages and pages of stockbrokers' dealings with a client, pages and pages of a credit company's business affairs, perhaps pages and pages of records of one of the big stores in the community . . .": Per Morand, J. in *Aynsley et al v. Toronto General Hospital*, [1968] 1 O.R. 425 at 431, 66 D.L.R. (2d) 575 at 581. In *Re Brown; Gordon v. Rosenberg* (1968), 17 C.B.R. (N.S.) 17, Registrar Cook admitted as business records, (1) documents of the bankrupt, possession of which were taken by the trustee pursuant to his statutory duty, and (2) all records prepared by the trustee in performance of his statutory obligations.

of admissibility. In Ontario, section 36 of *The Ontario Evidence Act* is the relevant provision and it provides as follows:

36.—(1) In this section,

- (a) "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
- (b) "record" includes any information that is recorded or stored by means of any device.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Subsection 2 does not apply unless the party tendering the writing or record has given at least seven days notice of his intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

It should be noted that although the wording of the section is cast in broad terms so as to encompass practically every type of writing utilized in connection with any operation,<sup>59</sup> whether it be profitable or not, two criteria must be met as preconditions to admissibility:

1. The record must have been made in the usual and ordinary course of business; and
2. It was in the usual and ordinary course of the business to make such writing.<sup>60</sup>

It is the latter qualification which severely restricts the type of documents that may be admitted; for, notwithstanding that documents may be made in the usual and ordinary course of business, if it is not the business custom of the activity or operation to maintain such a record, they are in-

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<sup>59</sup> In *Watkins Products Inc. v. Thomas* (1966), 54 D.L.R. (2d) 252, 51 M.P.R. 321, the Appeal Division of the New Brunswick Supreme Court, however, in interpreting the phrase in the New Brunswick provision, "a record or entry of an act, condition or event made in the regular course of a business" held that it did not include monthly statements of account or invoices. It said that the entry or record had to be in a book of account or something similar to it or related to it such as an employee's time card. The Ontario statute includes "any writing" and therefore may not be subject to such a restricted interpretation.

<sup>60</sup> The Evidence Acts of British Columbia, Nova Scotia and Saskatchewan also impose these two criteria. In New Brunswick, the record need only be shown to have been made in the "regular course of a business". Another requirement of admissibility is that the record be qualified by a witness who can testify that these two criteria have been fulfilled, or, in New Brunswick, that the document was made in the "regular course of a business": *Aynsley et al v. Toronto General Hospital*, *supra*, note 58 at 434 O.R. at 584 D.L.R.; *Watkins Products Inc. v. Thomas* (1966), 54 D.L.R. (2d) 252, (1965), 51 M.P.R. 321



admissible. An American case is illustrative of this point. In *Palmer v. Hoffman*,<sup>61</sup> the Supreme Court of the United States had occasion to consider these two criteria in a Federal provision worded similarly to the Ontario enactment. That was an action arising out of a railroad crossing accident in which the defendant tried to put in as evidence, a statement made by the deceased train engineer to some officials at the defendant's freight office. Although the engineer's report of the accident was a record made in relation to his employment, the court held that that was insufficient for the purposes of admissibility under the statute. Mr. Justice Douglas, speaking for the court, stated that in order to come within the business records statute, it must be shown to be a record which is necessary for the systematic and mechanical conduct of the business as a commercial enterprise. It must be a record that is routinely kept to run the business as a business. Most businesses are concerned about prospective litigation, and therefore, have a practice of taking statements from employees when an accident occurs. The primary purpose of such a document, however, is to assist in the lawsuit and not to assist in the running of the railway business. The court was fearful that there would be abuse should it allow in the report in question. The court speculated that a business could thereby introduce self-serving evidence, i.e., the statements which reflect its version of the accident. Such documents have nothing to do with the day-to-day operation and management of the railroad business. The trustworthiness of business documents is based on the reliability placed on such records by the commercial world. In the absence of routineness, there exists the danger that the maker of the record may not be motivated to be accurate. It is the mercantile nature of the record which attracts trustworthiness, not just the fact that the document was prepared in the regular course of business. The implied introduction into business record legislation of the factor that there be no motive to misrepresent is consistent with the requirements of the traditional common law exception.<sup>62</sup> Because there is scarcely any business record which could avoid exclusion on this ground, it may be best to give the Court power to inquire into the circumstances of the record making, and to exclude it only if the self-serving nature of the document would indicate a serious lack of trustworthiness.<sup>63</sup>

It could be argued that, even within the court's strict definition of the business record section, the train engineer's report was admissible on the ground that it is within the railroad's business as such to investigate mishaps and to record observations in order to improve and ensure the efficient running of trains. Moreover, in the United States, the railroad has to deliver monthly reports of accidents to the appropriate governmental agency setting forth the nature and causes of the accidents and accordingly, it could be said that the engineer's statement relates in substance to the operation of the railroad as a business enterprise.<sup>64</sup>

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<sup>61</sup> (1943), 318 U.S. 109, 63 S. Ct. 477.

<sup>62</sup> See text, *infra* at p.14.

<sup>63</sup> See Rules of Evidence for United States Courts and Magistrates (1973), R. 803(6).

<sup>64</sup> (1910), 36 Stat. 350, (1940), 45 U.S.C., §38.

In *Otney v. United States*,<sup>65</sup> the issue was whether certain documentary diagnostic evidence of the accused's mental competency could be introduced by the prosecution under the Federal business record statute to establish the accused's sanity. The United States Court of Appeals, while acknowledging that the statute was to be interpreted broadly, held the document inadmissible on the ground that the statute was never intended to apply to written psychiatric opinion made for purely evidentiary purposes. The purpose of the accused's mental examination was not for treatment or cure, which is the normal business of a hospital, but solely to enable psychiatrists to inform the Court whether he was fit to stand trial. It was therefore found to be outside the regular course of the hospital's business. Even in situations where the hospital report has been prepared for both a 'business' and litigation purpose, it will be excluded. In *Horn v. Sturm*,<sup>66</sup> there were two reasons for the preparation of an autopsy report: (1) to obtain information which would be helpful in the treatment of future patients and (2) to obtain information useful in prosecuting or defending a damage action. The Court held the report inadmissible in the malpractice action because one of the reasons for its preparation was for use in litigation.

The commercial aspect of the document as it relates to the business is therefore paramount. In view of the fact that no Canadian court has, as yet, interpreted these provisions of the Ontario statute, the American cases are consequently instructive in this area.

Another notable feature of the Ontario provision is that it contemplates the admissibility of a record based upon hearsay. Subsection 3 makes it clear that lack of personal knowledge by the maker of the record will not affect the admissibility of the document, although it may go to the question of weight. Thus, a record based upon information given to the maker is nevertheless admissible. This provision, however, may not necessarily receive a broad interpretation from the courts. Although no Canadian court has dealt squarely with the point, the New York Court of Appeal's decision in *Johnson v. Lutz*,<sup>67</sup> may be indicative of things to come. In the *Johnson* case, which was an action arising out of a motor cycle accident, entries contained in a police officer's report were held to be inadmissible on the ground that they were not based upon the officer's personal knowledge but upon information given to him by a bystander. The court held that the police report did not fall within the New York equivalent of section 36 of *The Ontario Evidence Act*, notwithstanding the explicit provision contained in the New York statute to the effect that

All other circumstances of the making of... [the] record, including lack of personal knowledge of the entrant or maker... shall not affect its admissibility.

The court held that the police report of the accident was not a record made in the regular course of business in the sense that the legislature intended. The report was based on statements made voluntarily to the police

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<sup>65</sup> (1965), 340 F. 2d 696.

<sup>66</sup> *Supra*, note 51.

<sup>67</sup> (1930), 253 N.Y. 124, 170 N.E. 517.

officer. The party informant was under no duty to make a statement to the police officer. To come within statutory provision, the court held that it had to be shown that not only the maker of the record was acting pursuant to a business duty, but that the person from whom he received the information, was acting under a business duty as well. It is the business element of the record which gives it credence and efficacy. Without it, the purpose of the legislation is lost. The reliability of the record turns on the maker's duty to make the entry and upon the duty of the informant to give the information to the maker. Neither the New York statute nor section 36(4) of *The Ontario Evidence Act* preclude the maker of the record from relying on hearsay information. He need not have first hand personal knowledge of the fact that he is recording. It can be based on the information given to him by others; but, in light of *Johnson v. Lutz*, it could be said that the informant must be under a business duty to impart that information to the maker. The Court therefore has read into the statute a condition not expressly contained in it. Both the statement and its basis must be made entirely in the course of business, the rationale being that little assurance of trustworthiness can be given to reports based upon information supplied voluntarily and casually by an individual unrelated to the business.<sup>68</sup>

Unless there is some guarantee of reliability in the particular circumstances, the general practice of allowing in business records based on hearsay is inherently dangerous. It is submitted, however, that the wording of section 36(4) is explicit and has taken heed of the weakness of multiple hearsay. The legislature expressly stated that such weakness was to go to the question of weight alone and not to admissibility. In the few decisions that have involved section 36, Ontario courts, however, have shown a propensity to follow the rationale in *Johnson v. Lutz* rather than the literalness of the provision.

In *Adderly v. Bremner*,<sup>69</sup> Brooke J., held that only that part of the hospital record which relates to occurrences taking place in the hospital and routinely recorded are admissible, but not that part of the record which relates to occurrences or events taking place prior to admission to the hospital and recorded as part of the case history. He stated

... I do not think that the intention of the legislature was to permit a plaintiff to prove his case by introducing as proof of the truth of its content, the history that may be amongst the hospital records — being a history that the plaintiff or some other person had recounted on the plaintiff's admission to or while in hospital. Nor do I think it was the intention of the legislature to open to a plaintiff a means of escaping the test of truth through cross examination by resort to the hospital history record.<sup>70</sup>

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<sup>68</sup> But see *Simpson v. Lever*, [1962] 3 A11. E.R. 870 where Winn J., admitted a police officer's book containing an unsigned statement of an unavailable witness under a differently worded English provision. Most of the American authorities have confirmed the principle in *Johnson v. Lutz*: See *Gencarella v. Fyfe* (1948), 171 F. 2d. 419; *Gordon v. Robinson* (1954), 210 F. 2d. 192; *Standard Oil Co. v. Moore* (1957), 251 F. 2d 188, cert. denied 356 U.S. 975; *Yates v. Blair Transport Inc.* (1965), 249 F. Supp. 681.

<sup>69</sup> [1968] 1 O.R. 621, 67 D.L.R. (2d) 274.

<sup>70</sup> *Id.*, at 623 O.R. at 276 D.L.R.

Thus, notwithstanding sub-section 4, the court ruled inadmissible self-serving statements made by a patient to his doctor and recorded in a hospital note. The case suggests that such statements by the patient do not fall within the purely business nature of hospital treatment and thus the decision in *Adderly v. Bremner* is consistent with *Johnson v. Lutz*.

Are such statements so unreliable as to warrant exclusion, even in the face of the clear words of section 36(4)? It has been urged that the maker of the statement has a motive to falsify and he should not be allowed to have such evidence admitted under the guise of business records without any test of cross examination. In *Northern Wood Preservers Ltd., v. Hall Corp. (Shipping) 1969 Ltd., et al.*,<sup>71</sup> Lacourciere, J. excluded an entry in a log book which was tendered as a business record under section 36 of *The Ontario Evidence Act*, because, notwithstanding it was made contemporaneously with the event and in pursuance of a duty to record, there may have been present some motive to misrepresent. Yet the Ontario Court of Appeal has not considered the motive to misrepresent too great a hazard in admitting business records under section 36 in other areas. In *Conley v. Conley*,<sup>72</sup> for example, the notes of the private investigator as to observations of the adulterous conduct of the respondents were admissible under section 36 of *The Ontario Evidence Act*, notwithstanding they were prepared for and tendered on behalf of the party litigant. Are such records any more reliable than hospital records containing self-serving statements by patients? Or, for that matter are the latter any the less trustworthy than medical reports prepared on behalf of a party litigant which are admissible specifically under section 52 of *The Ontario Evidence Act*? With respect to all of those reports, the record was prepared in situations where there existed the possibility of a motive to misrepresent. They are not records merely setting out objective data of a business nature. They were made either for the purpose of litigation or at a time when litigation was foreseeable and contemplated.

To be consistent, and in view of section 36(4), which specifically states that the hearsay content of a business record does not render it inadmissible, then hospital records containing statements of the patient should be admissible as well. Although the hospital record relates to matters extraneous to the business of running a hospital, (i.e., the cause of the injury), these matters are important to the administration of medical care to the patient. Information provided by the patient as to the cause of injury is required in the diagnosis and treatment of the injury, and that is the very business of a hospital. In *Melton v. St. Louis Public Service Co.*,<sup>73</sup> the Supreme Court of Missouri held admissible under a comparable business record statute a hospital record containing statements describing the cause of the accident in which the patient was injured. In so doing, the court expressed its conclusion in this way:

The hospital wanted to know how the patient got hurt. This was helpful to the hospital because it aided in determining the nature and extent and proper treat-

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<sup>71</sup> [1972], 3 O.R. 751, 29 D.L.R. (3d) 413.

<sup>72</sup> *Supra*, note 17.

<sup>73</sup> (1952), 363 Mo. 474, 251 S.W. (2d) 663.

ment of the plaintiff's injury. The patient stated how he got hurt: The statement was recorded for the apparent purpose of furthering the hospital's business of determining the nature and extent and proper treatment of the injury; and the record of the statement was apparently made by someone of the hospital staff who presumably, in the circumstances of the recording, had no occasion to falsify the record. The record was surely of something — an act, condition or event — in the regular course of the hospital's business.<sup>74</sup>

In addition, the *Bremner* case would exclude hospital records which contain subjective data such as a doctor or nurse's diagnosis, opinion or impression, on the ground that they do not constitute "an act, transaction, occurrence or event", within the meaning of the words in section 36.<sup>75</sup> The court's concern was, presumably, that the subjective opinion of doctors and nurses based on their perception and not being subject to cross examination, are not as trustworthy as the recording of purely objective data. This is particularly true of psychiatric opinions and thus reports of this nature are not admissible under section 36 of *The Ontario Evidence Act*. As indicated by Morand J., in *Aynsley v. Toronto General Hospital*,<sup>76</sup> section 36 contemplates the admissibility of records containing only objective facts:

...that would mean such routine entries in a hospital record as the date of admission, the time of admittance, the name of the attending physician, the routine orders as to the care of the patient, such as the administration of drugs, notation by the nurse of taking temperatures ...<sup>77</sup>

In this context, the result in *Adderly v. Bremner* should be compared with the decision by the Supreme Court of Canada in *Ares v. Venner*. The subjective opinions of doctors and nurses contained in hospital records are inadmissible under section 36 of *The Ontario Evidence Act*, according to the *Bremner* case, but admissible at common law according to the *Ares* case. Thus, notwithstanding the existence of a business record statute in Ontario, the decision in *Ares v. Venner* is of considerable practical importance.

The debate as to whether medical opinions, as opposed to hospital records, and particularly, medical opinions prepared by a doctor for a party

<sup>74</sup> *Id.*, at 671 S.W.

<sup>75</sup> American Federal courts have been ambivalent in interpreting records of an "act, transaction, occurrence, or event". Some have preferred a narrow interpretation so as to exclude medical diagnoses and prognoses: *New York Life Insurance Co., v. Taylor* (1945), 147 F. 2d 297; *England v. United States* (1949), 174 F. 2d. 466; *Lyles v. United States* (1957), 254 F. 2d. 725, cert. denied 356 U.S. 961; *Skogen v. Dow Chemical Co.* (1967), 375 F. 2d. 692. Others have liberally admitted diagnostic records: *Reed v. Order of United Commercial Travellers* (1941), 123 F. 2d. 252; *Buckminister's Estate v. Commissioner of Internal Revenue* (1944), 147 F. 2d. 331; *Medina v. Erickson* (1955), 226 F. 2d. 475; *Thomas v. Hogan* (1962), 308 F. 2d. 355; *Glawe v. Rulon* (1960), 284 F. 2d. 495. State courts, for the most part, have admitted such entries: *Borucki v. MacKenzie Bros. Co.* (1938), 125 Conn. 92, 3 A. 2d. 224; *People v. Koklmeyer* (1940), 284 N.Y. 366, 31 N.E. 2d. 490; *Wees v. Wees* (1947), 147 Ohio St. 416, 72 N.E. 2d. 245; *Allen v. St. Louis Public Service Co.* (1956), 365 Mo. 677, 285 S.W. 2d. 663. The Rules of Evidence for United States Courts and Magistrates, effective July, 1973, adopts the view of liberal admissibility by expressly including "opinions or diagnoses" in addition to "acts, events, conditions".

<sup>76</sup> *Supra*, note 58, varied on other grounds, [1969] 2 O.R. 829, 7 D.L.R. (3d) 193, aff'd by S.C.C., (1972), 25 D.L.R. (3d) 241.

<sup>77</sup> *Supra*, note 58, at 432 O.R., at 582 D.L.R.

specifically for the purposes of litigation, comes within section 36 of *The Ontario Evidence Act* is now just academic because section 52 of *The Ontario Evidence Act* expressly makes such opinion admissible without calling the doctor to the stand. That provision reads as follows:

52.—(1) Any medical report obtained by or prepared for a party to an action and signed by a legally qualified medical practitioner licensed to practise in any part of Canada is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the action.

(2) Unless otherwise ordered by the court, a party to an action is entitled to obtain the production for inspection of any report of which notice has been given under subsection 1 within five days after giving notice to produce the report.

(3) Except by leave of the judge presiding at the trial, a legally qualified medical practitioner who has medically examined any party to the action shall not give evidence at the trial touching upon such examination unless a report thereof has been given to all other parties in accordance with subsection 1.

(4) Where a legally qualified medical practitioner has been required to give evidence *viva voce* in an action and the court is of opinion that the evidence could have been produced as effectively by way of a medical report, the court may order the party that required the attendance of the medical practitioner to pay as costs therefore such sum as it considers appropriate.<sup>78</sup>

Under section 52, medical reports are admissible with leave of the court.<sup>79</sup> Thus, an opponent can object to such an order and demand that the party call the doctor to give oral testimony and therefore, be subject to cross examination. If the opponent requires the attendance of the doctor needlessly, and the court is of the opinion that the evidence could have been given as effectively by just putting in the medical report, the court may penalize that party in costs. This statutory provision is instrumental in saving both time and monetary expenditure of physicians and litigants. Although it is clear that such medical reports may contain subjective data and interpretation by way of diagnosis and prognosis, if the report contains statements that were made by the patient to the doctor as to how the accident occurred, such statements are not admissible under section 52.<sup>80</sup> It would be improper for the doctor to relate a statement made to him by the patient as to the cause of his injury if the doctor took the stand. It is no less admissible because it is contained in a medical report.

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<sup>78</sup> R.S.O. 1970, c.151. Similar provisions are found in the Saskatchewan Evidence Act, R.S.S. 1965, c.80, as amended by S.S. 1969, c.51, s.30B; Quebec Code of Civil Procedure, S.Q. 1965, 13-14 Eliz. II, Vol. II, c.80, amended by S.Q. 1968, 17 Eliz. II, c.84, s.294a.

<sup>79</sup> This section has been considered by Ontario courts in the following cases: *De Genova v. De Genova*, [1971] 3 O.R. 304, 20 D.L.R. (3d) 264 (failure to give a medical report does not necessarily render a physician's oral testimony at trial inadmissible); *Snyder et al v. Siutters*, [1970] 3 O.R. 789, 14 D.L.R. (3d) 173 (a physician may be called as a witness in addition to the filing of his report); *Iler v. Beaudet*, [1971] 3 O.R. 644 (the medical report to be given to the opposite party as a precondition to the doctor testifying at trial must substantially disclose the evidence that the doctor will give orally.)

<sup>80</sup> *Kapulica v. Dumancic*, [1968] 2 O.R. 438. *De Genova v. De Genova*, *supra*, note 79.

It was held in *Re Brady Infants*<sup>81</sup> that medical reports may be adduced in lieu of oral testimony in child welfare proceedings but only under strictly controlled conditions.<sup>82</sup> Those conditions were not met in the *Brady* case because the psychiatric reports in question, which suggested that the adopting parents were incapable of meeting the physical and emotional needs of the children whom the Children's Aid Society were seeking to make wards of the Society, were based entirely on hearsay without the benefit of any interviews with the mother. The report was therefore rejected.

Legislation similar to the Ontario business record provision, has been enacted by Parliament, but with a few major differences. The relevant provision contained in the *Canada Evidence Act* is as follows:

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

Under the *Canada Evidence Act*, the only major condition of admissibility is that the document be made in the usual and ordinary course of business. It does not contain the second condition as found in section 36 of *The Ontario Evidence Act* that it is in the usual and ordinary course of such business to make such a record. Thus a train engineer's report of an accident as in *Palmer v. Hoffman*,<sup>83</sup> for example, may be admissible under the *Canada Evidence Act* if it were applicable, whereas it would be inadmissible under *The Ontario Evidence Act*.<sup>84</sup> Although the train engineer's report would be made in his usual ordinary course of business, it may not have been the usual and ordinary course of business of the railroad to make such documents.

Nor is there any specific requirement of contemporaneity in the *Canada Evidence Act*. It need not have been a business practice to make the record in question at the time of the act or transaction or within a reasonable time thereafter as is required by section 36(2) of the Ontario Act. Section 30(6) of the *Canada Evidence Act* gives the trial judge discretion, however, to enquire into the circumstances surrounding the making of the record for the purpose of determining whether it should be admissible, or for the purpose of determining the probative value, if any, to be given to the information contained in the record.

Furthermore, unlike section 36 of *The Ontario Evidence Act*, there is no reason to believe that section 30 of the *Canada Evidence Act* will sanction records based on information provided by others. Note that the opening words of section 30 read,

Where oral evidence in respect of a matter would be admissible in a legal proceeding...

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<sup>81</sup> [1970], 2 O.R. 262, 10 D.L.R. (3d) 432.

<sup>82</sup> But Wright J., in *De Genova v. De Genova*, *supra*, note 79, in obiter stated that he did not think s.52 of the Evidence Act applied to exclude oral testimony in proceedings other than "actions".

<sup>83</sup> *Supra*, note 61.

<sup>84</sup> Section 30(10) of the *Canada Evidence Act*, however, might preclude its admissibility if the report was made in the course of an investigation or inquiry.

The statute merely provides a method of proof of an *admissible* fact. It does not make the document admissible when oral testimony of the same fact would be inadmissible. Thus, if the maker of the record took the witness stand, he could not testify as to what someone else told him. That would be inadmissible as hearsay and the same limitation applies to business records under section 30 of the *Canada Act*. The Federal provision does not have a sub-section similar to section 36(4) of *The Ontario Evidence Act* which states that a lack of personal knowledge does not affect the admissibility of the business record.

Section 30 of the *Canada Evidence Act* makes a record of "any matter" admissible, whereas *The Ontario Evidence Act* admits a record of any "act, transaction, occurrence or event". It could be argued, therefore, that by using the more general word, "matter", the *Canada Evidence Act* contemplates the admissibility of records which contain opinion and other subjective data.

Another major distinction between the Federal and provincial provision centres on the requirement of notice. Both section 30(7) of the *Canada Evidence Act* and section 36(3) of *The Ontario Evidence Act* provide that the party who intends to introduce the business record must give his opponent seven days' notice of his intention to do so and the opposite party has the right of inspection of the record within five days thereafter. Under both Acts, notice is a condition precedent to admissibility. Under section 30(7) of the *Canada Evidence Act*, such notice, however, may be dispensed with by an order of the court. If the record is simple and not detailed, the court may well exercise its statutory discretion and make an order allowing for the admission of the business record notwithstanding the absence of notice if it feels that the opposite party will not be severely prejudiced as a result of such lack of notice. By way of contrast, it is interesting to note that *The Ontario Evidence Act* gives no similar discretion to the trial judge to dispense with notice. Thus, under section 36 of *The Ontario Evidence Act*, no relief is available to the proponent of a business record if he fails to give the requisite notice, in which case he must resort to calling as witnesses, the persons who made the actual entries on the record. Both statutes are silent as to the form of notice to be given, but it is clear that the notice should contain a sufficient description of the record to be tendered so that the opposite party is informed of the precise documents to be submitted.

Unlike *The Ontario Evidence Act*, the *Canada* provision in sub-sections (3) and (4) takes into account the modern business practice of transcribing the contents of an original business record on to computer tapes and cards and other consolidating forms of record storage. Thus, if the record to be tendered as evidence is in a form different from the original record and as a result requires an explanation, a transcript of the explanation of the record may be submitted to the court if it is prepared by a person qualified to make the explanation and accompanied by his affidavit setting forth his qualifications to make the explanation and attesting to its accuracy. The *Canada Evidence Act* contemplates the admissibility of a copy of a record where it is impossible or not reasonably practicable to produce the original record, in which case the copy must be accompanied by an affidavit setting out the



reasons why the original record cannot be produced and setting out the source from which the copy was made and attesting to its authenticity.

Sub-section 2 of section 30 of the *Canada Evidence Act* expressly provides for a negative inference which the court can draw from the absence of relevant information in the record and may conclude that the matter which was not recorded, did not occur or exist. No similar provision exists under *The Ontario Evidence Act*, but it appears that there is nothing to prevent a trial judge from drawing such an inference.

#### D. *Conclusion*

Thus at the present time, counsel faced with the problem of adducing a business record must consider the viability of each segment of the tripartite authority permitting the introduction of business records. Since each head of admissibility has its own limitations, a counsel who is unable to bring his record within one, may find that another offers a convenient vehicle to admissibility.